THE MORE COMMON DEFENSES IN ACTIONS TO ENFORCE OBSERVANCE OF RESTRICTIVE COVENANTS ON THE USE OF REAL PROPERTY.[1]

General.—When equitable as distinguished from legal relief is sought, equitable as distinguished from legal defenses have to be considered. The conduct of a complainant may disentitle him to relief; his acquiescence in what he complains of, or his delay in seeking relief, may be sufficient to preclude him from obtaining it. And before granting equitable relief, courts of equity look not only to the words of a covenant, but to the object to attain which it was entered into, and if, owing to circumstances which have occurred since it was entered into, such object cannot be attained, equitable relief will be refused.

If the enforcement of the observance of a restrictive covenant would work injustice or be ineffectual of any meritorious result, equitable relief will be denied. If, from all the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking the enforcement will be left to whatever remedy he may have at law.[2]

Speaking generally, however, in the enforcement of restrictive covenants the court has no discretion to consider the balance of convenience or matters of that nature, but it is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own past conduct, delay, laches, or the like, disentitled himself to sue; that is to say, has raised against himself a personal equity.[3]

So, too, mere pecuniary loss to the defendant will not prevent a court of equity from enforcing observance of the restriction.[4]

Abandonment.—Among the equitable grounds which the

1. This article does not deal with questions of the violation of covenants, or what constitutes violation of particular covenants.

2. Ewertsen *v.* Gerstenberg, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310.

3. Osborne *v.* Bradley (1903), 2 Ch. 446, 89 L. T. Rep. 11.

4. Johnson *v.* Robertson (Ia. 1912), 135 N. W. 585.

courts have declined to interfere by injunction in cases in which it was sought to enforce the observance of restrictive covenants, is that of abandonment, brought about or participated in by those who were seeking to enforce the covenant.

Where the owner of a number of lots facing on the same street conveyed several of them to different purchasers subject to a restrictive covenant that no building should be erected thereon nearer than twenty-five feet to the street, and immediately thereafter the grantor and all of the grantees of such lots erected buildings within fifteen feet of the street, it was held that this was sufficient to show a complete abandonment of all the rights under the covenant, and that, therefore, one owner of a lot could not be restrained by another owner of a lot from erecting a building within five feet of the street.[5]

The principle asserted in such cases is that it would be inequitable to give to the plaintiff the benefit of the covenant which, by his conduct, he has seen fit to treat as void. It is obvious that the doctrine is in the nature of an equitable estoppel arising from the conduct of the complaining party. In view of the fact that other persons are likely to be led into violations by the conduct of the covenantee, equity requires diligence on his part if he would seek its preventive aid.

The right to enforce a restrictive covenant has been held to be wholly extinguished by non-user for twenty years, in view of the fact that the land subject to such restriction was used in a manner inconsistent with the existence of the restriction.[6]

Abandonment of General Plan of Improvement.—The mere fact that a number of houses have been erected in violation of a building restriction imposed on all of the lots in a sub-division, does not show a general abandonment of the scheme of improvement.[7]

In a district containing one hundred and fifty lots which was restricted to exclude flat buildings, two flat buildings were erected covering four lots some eight or ten years prior to the time in question and at a time when none other of the present

5. Scharer *v.* Pantler, 127 Mo. App. 433, 105 S. W. 668.
6. Smith *v.* Price, 214 Mass. 298, 101 N. E. 370.
7. Waters *v.* Collins (N. J. Eq. 1895), 70 Atl. 984.

owners of lots had purchased. Held, that such fact did not show an abandonment of the restriction, and that such owners were not precluded from enforcing the restriction against another breach on different premises.[8]

The owner of unimproved property divided it into lots, his "plan" being to sell the lots only for residence purposes. He sold several lots to A., the deed to which provided that "no business, manufacturing or other than dwelling houses shall be built upon said property." Subsequently he sold lots to other persons without restrictions. A railroad company purchased A.'s lots and commenced the erection thereon of a railway station, and the original owner brought suit to enjoin the violation of the covenant. Held, that by selling the remainder of the lots without restrictions, he had put it out of his power to carry out his plan of using the property for residences only, and that it was evident that he had abandoned his original intentions, and therefore, he could not maintain the action.[9]

Lots in a neighborhood were conveyed subject to a restriction that no building should be erected nearer than twenty feet to the street line. More than one hundred and fifty conveyances were made with this restriction, but subsequently about one hundred of the purchasers had violated the restriction. Nothing was done to enforce observance of the restriction, except that in 1898 a bill was filed seeking to enforce observance thereof, but it was allowed to remain without trial until 1905, at which time suit was brought to enforce the restriction against the defendant. Held, that the facts showed an abandonment of the original plan, and barred complainant of his right to enforce the restriction.[10]

In a general or neighborhood scheme, the burden follows the benefit. It is a mutual benefit accruing to all and to each which makes it inequitable to anyone so benefitted to repudiate the burden to the injury of the others. If, therefore, the parties in interest, by express act or passive acquiescence, permit such violations of the plan or scheme as destroy, wholly or partly, the

8. Thompson *v.* Langan (Mo. App. 1913), 154 S. W. 808.
9. Duncan *v.* Central Passenger R. Co., 85 Ky. 525, 4 S. W. 22 .
10. Chelsa Land & Imp. Co. *v.* Adams, 71 N. J. Eq. 771, 66 Atl. 180.

benefit therefrom, they have to a corresponding extent absolved each other from its burden.[11]

Acquiescence in Immaterial Violations as Amounting to Abandonment.—Acquiescence in immaterial violations of restrictions does not necessarily show an intention to abandon a general plan of improvement, and is no defense to an action brought to enforce the observance of such restrictions. The violation, to indicate an intention to abandon the general plan or scheme of improvement, must ordinarily be material and such as to prevent the general plan relating to the restricted territory from being carried out, or at least, to prevent the plan relating to that particular portion of the restricted territory from being carried out. The materiality of the violation is to be determined from the circumstances of each case.

An open piazza, with slender columns at the corners, and enclosed for a space of about three feet at the bottom, and projecting from the second story of a dwelling a few feet beyond the line to which building was restricted, has been held to be an immaterial violation of the building line restriction.[12]

A few sporadic instances of the violation of restrictions imposed under a general plan, which violations have not been attacked, do not, in themselves, furnish conclusive evidence of an abandonment of the plan.[13]

It has been held that the fact that complainant and other owners of property within a restricted district have erected verandas, porches, and steps within the portion of their lots restricted against buildings, which have not materially interfered with or obstructed the right of view, was not sufficient, as a matter of law, to show an abandonment of the scheme of restriction, it not appearing that there had been a general change in the street, or the conditions surrounding it, rendering the restriction useless to the complainant and other residents.[14]

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11. Sanford *v.* Keer (N. J. Eq. 1912), 83 Atl. 225.

12. Morrow *v.* Hasselman, 69 N. J. Eq. 612, 61 Atl. 369.

13. Compton Hill Imp. Co. *v.* Strauch, 162 Mo. App. 76, 141 S. W. 1159.

14. Seawright *v.* Blount, 139 Ga. 323, 77 S. E. 152.

Acquiescence in Violations Not Affecting Complainant's, Interests, as an Abandonment.—A complainant cannot be charged with having abandoned his rights under a restrictive covenant because he failed to interfere to enforce the covenant in a case in which he had no substantial interest to protect.[15]

In the case last cited it appeared that ten buildings had been erected in violation of restrictions imposed on property in a district in pursuance of a general plan, but only two of the buildings were within two blocks of plaintiff's property. It was held that plaintiff could not be charged with an abandonment of his right to enforce such restrictions.

A town site proprietor owning lots in various parts of an improved tract of land, may be directly interested in violation of restricted covenants imposed on such lots in any part of the entire tract, and acquiescence on his part may appropriately deny to him the equitable right to enforce the covenants, but a violation of such covenants at a point on the tract distant from the lot of an individual owner may be of no interest whatever to such owner, and cannot appropriately call for affirmative action on his part.[16]

The English cases, as well as the American, generally hold that a person entitled to enforce restrictive covenants may take no notice of violations not especially offensive to him without losing the right to enforce the restrictions in case of an especially offensive violation.[17]

Abandonment of One Restriction as Abandonment of Others.—Acquiescence in the violation of one of a number of restrictions imposed on the use of property does not necessarily show an intention to abandon rights under another of such restrictions.

Where a covenant provided that no building should be erected within twenty feet of the front line of the property, nor within five feet of the side line of any lot, violations of the restriction relative to the side line of the property acquiesced in by complainant, did not show an abandonment of his rights under the restriction relating to the front line of the property.[18]

15. Brigham *v.* Mulock Co., 74 N. J. Eq. 287, 70 Atl. 185.
16. Bowen *v.* Smith (N. J. Eq. 1909), 74 Atl. 675.
17. Johnson *v.* Robertson (Ia. 1912), 135 N. W. 585.
18. Brigham *v.* Mulock Co., 74 N. J. Eq. 287, 70 Atl. 185.

It has also been held that a restriction may be abandoned as to part of a tract of land and enforced as to the balance.[19]

Estoppel.—Speaking roughly, the principle of estoppel applicable in defenses to actions to enforce observance of restrictive covenants, may be stated to be that, where one person by his acts or words knowingly induces another to assume burdens which he would not otherwise have undertaken, the former person is estopped to take position or do acts to the prejudice of the latter that are inconsistent with the acts or words relied upon.[20]

However, mere silence or inaction on the part of a complainant in an action to enforce observance of restrictive covenants cannot amount to an estoppel, except where such silence or inaction amount to fraud.[21]

The owner of a lot contemplated erecting a dwelling thereon for his own use, but before fixing the location thereof he consulted the owner of adjoining premises as to the probable use of such premises, and was assured by the owner that the premises would not be used for a wagon yard or feed stable. Relying upon these representations, the owner erected a dwelling at considerable cost. Subsequently the adjoining owner threatened to erect a feed stable and wagon yard on his premises within sixty feet of the other's dwelling house. This would, according to the statement of the latter, render his home unfit for habitation. In an action brought to restrain the adjoining owner from erecting the feed stable and wagon yard it was held that the acts of the latter clearly constituted an estoppel *in pais*.[22]

Of course, there can be no estoppel invoked against a complainant, unless there is proof that he had knowlelge of the violations of the covenants which are set up as constituting an estoppel.[23]

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19. Ewersten *v.* Berstenberg, 186 Ill. 344, 57 N. E. 1051; Thornton *v.* Morris (N. J. Eq. 1910), 75 Atl. 757.

20. Woods *v.* Lowrance, 49 Tex. Civ. App. 542, 109 S. W. 418.

21. Miller *v.* Klein (Mo. App. 1913), 160 S. W. 562.

22. Woods *v.* Lowrance, 49 Tex. Civ. App. 542, 109 S. W

23. Miller *v.* Klein (Mo. App. 1913), 160 S. W. 562.

Waiver.—It has frequently been held that acquiescence may often operate as a waiver of the right to enforce covenants restricting the use of property without any physical change of a permanent nature having occurred in the property. But in all such cases it will probably be found that such substantial changes have been committed in the special conditions sought to be preserved by the covenant as to clearly indicate an intention on the part of the person entitled to enforce the covenant to relinquish the original purpose or scheme defined by the covenant, or that adverse equities have intervened by reason of failure to enforce the covenant.

Waiver is the intentional relinquishment of a known right, involving both knowledge of the existence of the right and an intention to relinquish it.[24]

In Massachusetts it is held that a plaintiff is not prevented from obtaining relief against the violation of property restrictions by the fact that he has not objected to a violation of the restrictions by some one in the neighborhood other than the defendant.[25]

Waiver of a right to the enforcement of restrictions contained in a deed may be shown by parol testimony.[26]

Illustrations.—The lots of adjoining owners were subject to restrictive covenants prohibiting any building from being erected nearer than ten feet of the street line. One of the owners commenced the erection of a building with eaves and bay windows projecting into the restricted portion of the lot. The other owner notified him that he considered the erection of the bay windows in such a manner a violation of the covenant, but made no other objections, and the building was erected with the bay windows eliminated and the eaves projecting over the building line. Held, that under the circumstances the plaintiff, owner of the adjoining lot, was not entitled to an injunction to require the removal of the eaves, projecting over the building line, as the defendant was warranted in proceeding with the erection of the house in this manner after plaintiff had com-

24. Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 144.
25. Bacon *v.* Sandberg, 179 Mass. 396, 60 N. E. 936.
26. Union Trust & Realty Co. *v.* Best, 160 Cal. 262, 116 Pac. 737.

plained of the windows but made no objection to the eaves.[27]

The owner of property, in conveying a portion thereof, inserted restrictive covenants in the deed which were applicable to a residential neighborhood, and had relation to the protection of the dwelling house occupied by the grantor on his remaining property. Subsequently his grantees of such remaining portion pulled down the dwelling house and converted the property to business uses. Held, that the advantage of the restriction could no longer be claimed in favor of such property.[28]

A restriction in a deed of conveyance of a lot against the sale of liquor thereon is waived by the subsequent conveyance by the same grantor of adjoining premises without restriction, and such adjoining premises have been and are used for the sale of liquor. It is not material in such a case that the omission of the restriction in the latter conveyance was a mistake.[29]

Complainant was the owner of a dominant estate in favor of which restrictions were imposed on the servient estate against the use of the latter for the sale of intoxicating liquors. A saloon was opened on the servient estate in May, and in May or June complainant drank beer in the saloon. It was shown that in May of the following year complainant refused to execute a written waiver or release of the restriction when requested to do so by the owner of the saloon. Held, that no waiver was shown.[30]

The defendant purchased one of the lots in a tract of land in which all were subject to a restriction that no building other than a residence with the customary out-buildings should be erected thereon, and that such residence should be erected not less than a specified distance from the front line of the premises, and erected thereon a dwelling which violated such restriction. It was held that complainant could not be said to have waived

27. Meany *v.* Stork (N. J. Eq), 83 Atl. 492.

28. Deeves *v.* Constable, 87 N. Y. App. Div. 352, 84 N. Y. Supp. 592.

29. Jenks *v.* Pawlowski, 99 Mich. 110, 56 N. W. 1105, 22 L. R. A. 863, 39 Am. St. Rep. 522.

30. Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 144, affirming 59 Ill. App. 581.

his right to maintain an action on account of such violation by reason of the fact that before defendant bought his lot buildings had been placed on various other lots in the tract in violation of the restriction without objection on the part of the complainant or other lot owners, where there was nothing to show that complainant was damaged by such other violations, or had any knowledge thereof until after the commencement of the action.[31]

Where Complainant Was Not Materially Affected by Other Violations.—Where the owner of a lot in a territory uniformly restricted under a general scheme in which restrictions were imposed on each lot for the benefit of all others within the territory, was not materially affected by several violations of such restrictions, he is not thereby barred of enforcing observance of such restrictions against the owner of a lot whose violation would materially affect him in the use of his property.[32]

This is in accord with the principle that a complainant does not waive or lose his right to enforce restrictions where their violation becomes especially and personally offensive and injurious to him and his property by reason of his previous omission to take notice in cases not affecting him or his interests, or the locality in which his property is situated.[33]

The fact that complainant's neighbors have erected steps and ornamentations which project into the restricted portion of their lots, of which he has not complained, does not estop him from complaining of the erection of the front wall of a building several feet beyond the building line.[34]

Nor is a complainant estopped to complain of a breach of a restrictive covenant merely because he acquiesced in its violation in a prior instance, where the former breach was slight, and the latter flagrant and would greatly injure him. Especially is this true when the validity of the covenant at the time of the first violation was in doubt.[35]

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31. Alderson *v.* Cutting, 163 Cal. 503, 126 Pac. 157.
32. Barton *v.* Slifer (N. J. Eq. 1907), 66 Atl. 899.
33. Schadt *v.* Brill (Mich. 1913), 139 N. W. 878.
34. Tripp *v.* O'Brien, 57 Ill. App. 407.
35. Misch *v.* Lehman (Mich. 1913), 144 N. W. 556.

Complainant cannot be said to have waived his rights under a restrictive covenant forbidding the erection of double houses, where he permits the erection of such a house without protest in a different block from that in which his own land is situated, and which is more than a quarter of a mile distant from his land and the respective blocks are separated by a street sixty feet wide.[36]

Consent to Modification of Covenant Is Not a Waiver.—A restrictive covenant may, of course, between the parties interested therein, be modified to any extent and the parties will be bound by the covenant as modified without any question of waiver being raised.

A lease provided that the demised premises should be used "strictly as a private dwelling, and not for any public or objectionable purpose," and contained a renewal clause. In an action to compel specific performance of the renewal clause, it was held that the use of the premises as a boarding house constituted a defense to the action, as the use was in violation of the terms of the covenant, and the fact that the lessor had consented that the premises be used for sleeping rooms in connection with a girls school did not constitute a waiver of such covenant.[37]

In this respect the court said: "The consent of the lessor that the plaintiff might occupy and use the house himself, in connection with his school for young ladies, cannot fairly be construed as a general or absolute waiver of the limitations as to the nature of the occupation. It is not the case of a condition which, when once dispensed with, is discharged for all purposes, and cannot be revived, but of a covenant which can be modified by consent. The lessor might be willing to consider such a use of the house as not an entire departure from its intended character of a private dwelling, and not to an appropriation to a public or objectionable purpose. But its conversion into a public boarding house is an entirely different matter."

Acquiescence in Slight Violation Does Not Give Right to Violate in Greater Degree.—Although a complainant may lose

36. Schadt *v.* Brill (Mich. 1913), 139 N. W. 878.

37. Gannett *v.* Albree, 103 Mass. 372.

the right to enjoin a defendant from violating restrictions imposed on the use of his land by acquiescence in such use for a number of years, he may still enforce observance of such restrictions to prevent an extension of the business constituting the violation, where such extension would constitute a violation in a much greater degree and render the business very objectionable.[38]

It has been held that acquiescence in the erection and operation of noxious works in violation of restrictive covenants, while they produce little injury, does not warrant a subsequent extension of them to an extent productive of great damage.[39]

Where the Restrictions Are Imposed for the Benefit of the Grantor or His Property Exclusively.—When a grantor exacts restrictive covenants of a number of his grantees for his exclusive benefit, he is master of the situation in this respect, and may release one or more of such grantees from their covenants, or acquiesce in their violation of them, and enforce observance of similar covenants by the other grantees.

Likewise, where a restriction is imposed on a lot for the exclusive benefit of another lot, the fact that the owner of the dominant lot acquiesced in the violation of similar restrictions imposed on other lots in the vicinity, does not deprive him of the right to enforce observance of the covenant in question so long as it is of any benefit to him.[40]

Acquiescence in Violation of One of Several Restrictions.—The right to enforce observance of one restrictive covenant in a deed is not necessarily affected by acquiescence in the violation of another and distinct covenant as to the use of the same land and contained in the same deed.

A complainant may acquiesce in the violation of a restriction requiring that no buildings except dwellings shall be erected on the land in question, and retain his right to enforce observance of a restriction requiring the buildings to be of not more than a specified depth.[41]

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38. Leaver *v.* Gorman, 73 N. J. Eq. 129, 67 Atl. 111.
39. Bankart *v.* Houghton, 27 Beav. (Eng.) 425.
40. Lattimer *v.* Livermore, 72 N. Y. 174.
41. Lattimer *v.* Livermore, 72 N. Y. 174.

Where Complainant Has Violated the Restriction He Seeks to Enforce.—It is well settled law that one who violates a mutually restrictive covenant will not be heard in a court of equity to complain of a similar violation by his neighbor.[42]

If the case shows a wilful violation on the part of complainant of the covenant which he seeks to enforce, he is precluded from relief under the familiar rule that, he who seeks equity must do equity; or in other words, must come with clean hands and be free from iniquity in respect of the same subject-matter. This rule, however, is not applicable where, although complainant has not abided the covenant, he has not acted with a wilful purpose to disregard the rights of others. The doctrine of abandonment is less harsh than this rule, and may often defeat complainant's suit where the application of this rule would seem harsh and almost inequitable.[43]

In determining whether complainant is chargeable with such inequitable conduct as to disentitle him to enforce any rights whatever under a restrictive covenant, the whole situation and circumstances as to the nature, burden and object of the covenant, and the extent to which the violation by the complainant affects the covenant, must be considered as well as the circumstances of its violation, the denial of the remedy or relief is not a conclusion which follows necessarily upon the fact of complainant's violation, but depends upon the whole circumstances of the case as affecting his own equitable status.[44]

Although the complainant has acted in good faith, and unintentionally violated a restriction, he cannot enforce an adjoining owner to observe such restriction who has himself in good faith committed a similar violation.[45]

The court will sometimes grant relief to a plaintiff who has not kept his part of the contract, but this is when the breach is of such a nature that it may be fully repaired and one of the

42. Smith *v.* Spencer (N. J. Eq. 1913), 87 Atl. 158; Alvord *v.* Fletcher, 28 N. Y. App. 493, 51 N. Y. Supp. 117; Clum *v.* Brewer, 5 Fed. Cas. No. 2,910.

43. Scharer *v.* Pantler, 127 Mo. App. 433, 105 S. W. 668.

44. Howland *v.* Andrus, 80 N. J. Eq. 276, 83 Atl. 982.

45. Stollard *v.* Normile, 181 Mass. 412, 63 N. E. 941.

conditions precedent to the granting of relief may be full reparation.[46]

Where Plaintiff's Violation Has Been Slight.—Although the complainant may have been guilty of some unsubstantial violation on his part of the restrictive covenant which he seeks to enforce, equity will restrain a substantial violation by the defendant.

Thus, where complainant sought to enforce a restriction providing that dwellings erected on the premises in question should be set back twenty-five feet from the street line, the fact that the steps of his house projected about four feet into the restricted space on his own lot, was not such a violation on his part as to preclude him from maintaining an action to enjoin the defendant from a substantial violation of the covenant.[47]

The fact that complainant violated a restrictive covenant by the construction of an open piazza which extended into the restricted portion of his lot, but did not obstruct the view from adjacent property, was held not to bar him of a right to enforce observance of such restriction by an adjacent owner, as his violation was immaterial.[48]

Violation by Only Some of Complainants.—Where several complainants join in the same suit to restrain the violation of a restrictive covenant, the fact that one of them has been guilty of a violation of the same covenant which they seek to enforce observance of, will not prevent the granting of injunctive relief in the action.[49]

Laches.—Relief in equity in which the enforcement of a restrictive covenant is sought is granted only when sought with promptness, and where active diligence has been exercised throughout respecting matter of complaint. Conscience requires that one should not stand by in silence while another makes considerable expenditures in good faith under an assumed right, and then ask a court to enforce compliance with the cove-

46. Clum *v.* Brewer, 5 Fed. Cas. No. 2,910.

47. Adams *v.* Howell, 58 N. Y. Misc. 435, 108 N. Y. Supp. 945.

48. Newbery *v.* Barkalow (N. J. Eq. 1909), 71 Atl. 752.

49. Compton Hill Impt. Co. *v* Strauch, 162 Mo. App. 76, 141 S. W. 1159.

nant at great loss, when reasonable notice or other appropriate action might have prevented the wrong complained of.[50]

Every relaxation of the terms of the covenant permitted amount, *pro tanto,* to a disaffirmance of their obligations.[51]

There is no hard and fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations, or otherwise change his position, or in any way by inaction lulls suspicion of his demands, to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid to the establishment of an admitted right.

So long, however, as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts there can be no laches. Upon the discovery of infringement of rights, such reasonable expedition is required in their prompt assertion as is consistent with due deliberation as to the proper means of relief.

On the other hand, one who openly defies known rights, in the absence of anything to mislead him or to indicate consent or abandonment on the part of others, is not in a position to urge as a bar failure to take the most conceivable resort to the courts. After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for the early enforcement of demands as exist before conditions have become fixed. Mere lapse of time, although as important, is not necessarily a decisive consideration. Within the somewhat flexible limitations of these general rules, what may be laches in any case depends upon its peculiar facts.[52]

The owner of land commenced the erection of a building in violation of restrictions imposed on the use thereof, and was

50. Loud *v.* Pendergast, 206 Mass. 122, 92 N. E. 40.
51. Russell *v.* Harpel, 20 Ohio Cir. Ct. Rep. 127.
52. Stewart *v.* Finkelstone, 206 Mass. 28, 92 N. E. 37.

notified by the owner of the dominant estate to discontinue such violation, which he did. Several months thereafter he resumed the construction of the building, and on the same day that he commenced work he was again warned by the owner of the dominant estate, but continued and rushed the work to completion in two days. Held, that he could not claim that the owner of the dominant estate had been guilty of laches.[53]

Where the construction of a building by defendant in violation of a restriction was concealed from public view by a high board fence, which enclosed the premises along the street, and complainant filed his bill as soon as he discovered that the building was in violation of the restriction, he was not guilty of laches.[54]

Change in the Character of the Restricted Neighborhood.— Courts of equity have uniformly refused to interfere for the purpose of enforcing observance of a restrictive covenant where the evidence shows that a state of things has arisen in the march of events which the parties to the agreement did not contemplate when it was made, and which would render its enforcement inequitable and unjust, resulting in injury to the defendant without any permanent benefit to the complainant.[55]

If covenants restricted the grantees of lots to use of them for residence purposes, and since their execution the whole neighborhood has ceased to be used for such purposes and has been wholly given up to business, manufacturing and the like, equity will likely refuse to enforce observance thereof.[56]

This principle has never been applied, however, where a certain part of property has been devoted to a use which can be shared by adjoining property belonging to the grantor, and which had been for many years improved and occupied in accordance with the mutual covenants to which all the adjoining property was subject. Under such a reservation or covenant

53. Hansel *v.* Downing, 17 Pa. Super. Ct. 235.

54. Codman *v.* Bradley, 201 Mass. 361, 87 N. E. 591.

55. Boston Baptist Social Union *v.* Boston University, 183 Mass. 202, 66 N. E. 174; Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476.

56. Moore *v.* Curry (Mich. 1913), 142 N. W. 839.

there has been acquired a property right which is appurtenant to the dominant owner's estate and to which the servient owner's property is subject, and which cannot be destroyed without compensation.[57]

Where the change in the neighborhood does not tend to defeat the essential purpose of the restriction, the benefit therefrom is considered to remain unimpaired, and a violation will be enjoined.[58]

It has been held that if a restriction is still of substantial value to a dominant estate, equity will restrain its violation if relief is promptly sought, notwithstanding the changed use of the land and buildings in the vicinity.[59]

The fact that the character of the territory surrounding the restricted district has changed does not affect the question of the enforcement of the restriction within such district.[60]

To defeat the enforcement of a restriction against the sale of intoxicating liquor on premises, on the ground of a change in the character of the neighborhood, there must be such a change caused by the grantor or those claiming under him, as to defeat the purpose of the restriction or to seriously injure the property rights of the grantee if enforced.[61]

A building line restriction may sometimes be enforced after the street has changed from a residence to a business one. Such a covenant may be as advantageous where the property fronting on the street is used for business purposes as when it was used for residences.[62]

The mere fact that lots subject to restrictions forbidding their use for other than dwelling purposes become more valuable for

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57. Batchelor *v.* Hinkle, 132 N. Y. App. Div. 620, 117 N. Y. Supp. 542.

58. Sanford *v.* Keer (N. J. Eq. 1912), 83 Atl. 225.

59. Landell *v.* Hamilton, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227.

60. Thompson *v.* Langan (Mo. App. 1913), 154 S. W. 808.

61. Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 144.

62. Zipp *v.* Barker, 6 N. Y. App. Div. 609, 40 N. Y. Supp. 325.

business purposes, is not enough to justify a court in nullifying such covenants.[63]

Where, by reason of changed conditions, it would be inequitable to enforce the observance of restrictive covenants, a court of equity may sometimes deny such relief and at the same time, in lieu thereof, award damages for such breach.[64]

C. P. PERRY,
in the *Central Law Journal.*

63. Miller *v.* Klein (Mo. App. 1913), 160 S. W. 562; Spahr *v.* Cape, 143 Mo. App. 114, 122 S. W. 379.

64. Amerman *v.* Deane, 132 N. Y. 355, 30 N. E. 741.